CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE MAY, DECEASED, PETITIONERS,

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR 23RD DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,442)

(34,442)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1929

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RECORD.

Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, at No. 3097 in Law, may be found the following words and figures:

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY and LOUIS J. AFFELDER, executors of the last will and testament of Pauline May, deceased, v. D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania.	No. 3097 Law.

Docket Entries.

July 15, 1924, Praecipe for summons in assumpsit and statement of claim filed.

July 15, 1924, Summons in assumpsit issued returnable first Monday next.

July 18, 1924, Summons returned on D. B. Heiner, Collector of Internal Revenue, by handing to and leaving a true and attested copy with him personally, at Pittsburgh, Pa. on July 15, 1924.

July 18, 1924, Praecipe for appearance of Walter Lyon and Warren H. Van Kirk, attorney for defendant, filed.

Aug. 12, 1924, Motion to strike off plaintiff's statement filed and entered.

June 24, 1925, Amended statement of claim filed.

Aug. 3, 1925, Motion to strike off plaintiff's statement of claim from the record filed and entered.

Jan. 12, 1928, Opinion and order filed and entered, directing that the judgment be entered for the defendant on the question of law raised by affidavit of defense.

Feb. 25, 1928, Notice of appeal with service accepted filed.

Feb. 25, 1928, Stipulation for printing record filed.

Feb. 25, 1928, Assignment of errors filed.

Feb. 29, 1928, Cost bond on appeal approved by the Court and filed.

May 3, 1928, Certificate of probable cause for collection of tax filed.

Amended Statement of Claim.

Filed June 24, 1925.

Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, executors of the last will and testament of Pauline May, deceased, of the city of Pittsburgh, county of Allegheny, state and district aforesaid, plaintiffs, bring this action against D. B. Heiner, Collector of Internal Revenue for the 23rd District of Pennsylvania, the defendant, to recover the sum of Five Thousand Seven Hundred Sixty-three and 82/100 ($5,763.82) Dollars, with interest from the 11th day of September, 1923, upon a cause of action whereof the following is a statement:

1. Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, are the executors of the last will and testament of Pauline May, deceased, who died in the city of Pittsburgh, state of Pennsylvania, on the 25th day of March, 1920.

2. D. B. Heiner, defendant above named, is the collector of internal revenue for the 23rd District of Pennsylvania, with whom the plaintiffs filed all of the claims hereinafter more fully set forth, and to whom plaintiffs made the payment for the recovery of which this suit is brought.

3. Heretofore, to-wit, on the 23rd day of March, 1921, plaintiffs made what is known as a return for Federal estate tax due from the estate of the said decedent in the manner provided by law, and filed the same with the defendant.

4. Heretofore, to-wit, on the 28th day of April, 1921, plaintiffs made an amended return, and in said return as amended, the plaintiffs declared the total gross estate of said decedent to be the sum of $206,260.87, the total deductions $57,799.34, and the net estate for taxes $148,461.53. The taxes due on said estate, calculated in the manner provided by law, was $2,469.23, which sum was duly paid by the plaintiffs to the defendant.

5. In Schedule E of said returns, the executors, complying with the requirements of the United States Revenue Acts and the regulations of the Treasury Department, listed as assets of the said estate, the sum of $20,800 as the value of all gifts and transfers, including trusts, of a material part of the estate, made or executed by the decedent within two years prior to the date of her death, other than by a bona fide sale

for a fair consideration in money or money's worth, said schedule containing the details of the transfer, that is, a specific description of the property transferred and its value on the date of decedent's death, and, in further pursuance of the said requirements and regulations, and particularly in answer to question 4 appearing on said schedule E, viz.:

"4. What trusts, if any, created by the decedent, were in existence at the time of his death."

plaintiffs answered said question:

"See copy attached"

and attached to the said schedule, as Exhibit #1, a copy of a declaration of trust made by the decedent on May 15th, 1917 and a copy of an agreement dated the 1st day of October, 1917, made by the decedent as assignor with Barney May, Walter May, Herbert L. May, Edwin C. May and Louis J. Affelder, therein designated as Trustees. A copy of said Schedule E, marked Exhibit "A", is hereto attached and made part hereof.

In the first declaration of trust above mentioned, the decedent recited that she held certain property, viz., certain bonds, stocks, notes and moneys, part of which, amounting to a market value of about $150,000, including special bank account, were purchased largely with the funds of her husband, Barney May, and she desired to place them in trust as thereinafter mentioned, and that she did therefore, in consideration of the above and for other good and valuable considerations, agree as follows: That she, the said Pauline May, will sell, assign and transfer the said property to Barney May, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder as trustees, said

trustees to pay to Barney May the net income for life, and after his death to Pauline May (the assignor) for life, if she survived him, and after the death of both of them, that is, the said Barney May and Pauline May, the said property is to be divided equally among her sons and daughter, Walter A. May, Estelle M. Affelder, Herbert L. May and Edwin C. May, all of which will appear in a formal instrument of trust to be drawn up listing the said property and duly executed by her, the said Pauline May.

In the said agreement of the 1st day of October, 1917, above referred to, it is provided as follows: 1st, the assignor, the said Pauline May, does transfer and assign to the said trustees (being the same persons mentioned as trustees in the declaration of trust dated May 15th, 1917 hereinabove referred to) all of the bonds, stocks, securities, sums of money and other property mentioned in the list or lists attached thereto signed by the parties, in trust for the purposes, among other things, of collecting the dividends, interest and and income thereof, investing and reinvesting the proceeds of the sale or sales of said securities, and for the payment of net dividends, interest and income thereof after payment of all taxes, costs and expenses, to the said Barney May during his lifetime, and after his decease to the said Pauline May during her lifetime, and and after her decease, all the property of said trust, in whatever form or shape it may then be, was, after the expenses of the trust had been deducted or paid, to be distributed equally between Walter A. May, Herbert L. May, Edwin C. May and Estelle M. Affelder, children of the said Pauline May and Barney May, and in case of such children be deceased, then as such de-

ceased child shall appoint by his or her last will and testament or by other written instrument directed to the trustees, and in default of such appointment, to the heirs of such deceased child, *per stirpes*. Then follows a list of the said bonds, stock, securities, sums of money and other property.

Plaintiffs did not include the amount of the said last mentioned bonds, stocks, securities, sums of money and other property in the gross estate of the decedent for the reason that the said transfer was not a transfer of a material part of the estate of the decedent made or executed by her within two years prior to the date of her death other than by bona fide sale, for a fair consideration in money or moneys worth, and particularly for the reason that the said transfer was made more than two years prior to the death of the decedent and was not made in contemplation of death or to take effect at or after the death of the said decedent.

6. On or about March 5th, 1923, the defendant, as collector of the United States internal revenue for the 23rd district of Pennsylvania, claiming to act in pursuance of the provisions of the United States Internal Revenue Act of 1918, served a notice and demand for payment on the plaintiffs of an additional estate tax assessed by the Commissioner of Internal Revenue against the estate of said decedent, amounting to $5,557.76; a copy of said notice and demand and the letter and notice from the Commissioner of Internal Revenue referred to in said letter of the defendant's dated March 5th, 1923, is hereto attached and made part hereof, and marked Exhibit "B". That, as appears by the said letter and notice from the Com-

missioner of Internal Revenue forming part of Exhibit "B", certain minor changes were made in the valuations of certain items in the gross estate and a minor change in a deduction, and the said Commissioner included among the transfers of property required to be listed under Schedule E of the return, the items of property transferred by the decedent by the instrument dated May 15th, 1917, and amplified by the instrument dated the 1st day of October, 1917 forming part of Exhibit "A" attached hereto, at a valuation of $163,089.18, thereby increasing the net value of the estate by the said sum of $163,089.18; that the inclusion of said last mentioned property valued at $163,089.18, was erroneous and unlawful.

7. That plaintiffs, on or about March 30th, 1923, paid to the defendant the sum of $33.34 additional tax on said estate, being the additional tax due by reason of the minor changes made as above referred to, and on or about the 30th day of March, 1923, made to the Commissioner of Internal Revenue a claim for abatement for the balance of $5,524.42 of said additional tax assessment, a copy of said claim for abatement being attached hereto and made part hereof, marked Exhibit "C". On May 1st, 1923, the Commissioner of Internal Revenue formally rejected the plaintiffs' claim for abatement in its entirety and on the merits thereof and on May 3rd, 1923 the defendant made a demand upon the plaintiffs for the payment of the said sum of $5,524.42 together with interest at the rate of 10% per annum from April 5th, 1923 until paid. A copy of said demand is attached hereto and made part hereof and marked Exhibit "D".

8. On, to-wit, the 11th day of September, 1923, the plaintiffs paid to the defendant the sum of $5,763.82, being the sum of $5,524.42 with said interest, so illegally assessed against them, under protest and in order to avoid a penalty.

9. After the plaintiffs had made payment to the defendant of the said sum of $5,763.82 so improperly and erroneously assessed against them, to-wit on or about the 5th day of November, 1923, they duly filed with the said Commissioner a claim for refund of the amount so improperly and erroneously assessed. A copy of said claim for refund is attached hereto and made part hereof and marked Exhibit "E". On or about the 20th day of February, 1924, the said Commissioner formally rejected plaintiffs' claim for refund in its entirety and on the merits thereof. A copy of said decision of the Commissioner of Internal Revenue dated February 20th, 1924, is attached hereto and made part hereof and marked Exhibit "F".

10. No part of the said sum of $5,763.82 has been repaid to the plaintiffs and the whole amount thereof, with interest thereon from September 11th, 1923, remains due and owing from the defendant to the plaintiffs.

11. This is a suit of civil nature at common law and the matter in controversy, exclusive of interest exceeds the sum of $3,000, and this suit and the cause of action herein set forth, arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

Wherefore the plaintiffs claim damages of the defendant in the sum of $5763.82 with interest thereon

from September 11th, 1923 together with the costs of this suit.

SACHS & CAPLAN.

Western District of Pennsylvania,
Allegheny County, } *ss:*

Before me, the undersigned authority, a notary public in and for the County of Allegheny in said Western District of Pennsylvania, personally appeared Walter A. May, one of the plaintiffs above named, who being duly sworn, deposes and says that the facts set forth in the foregoing statement are true and correct.

WALTER A. MAY.

Sworn to and subscribed this 18th day of June, 1925.

DOROTHY C. PAULIN,
[SEAL] *Notary Public*

My commission expires January 7, 1927.

EXHIBIT "A"

Estate of Pauline May 23rd District of Pennsylvania

SCHEDULE E

Transfers.

Instructions.

All gifts and transfers, including trusts, of a material part of the estate made or executed by the decedent within two years prior to the date of death, other than by a bona fide sale, for a fair consideration in money

or money's worth, must be returned under this schedule and the value of the property shown in the first column. The value must also be extended into the second column for inclusion in the gross estate unless the executor has clear evidence to show that the transfers in question were not in fact made in contemplation of death.

All gifts and transfers made in contemplation of death or to take effect at or after death without such consideration, are taxable and must be included in the gross estate regardless of the date of transfer. All transfers of a material part of the decedent's estate made more than two years prior to death must be returned under this schedule, but the value need not be extended into the second column if the executor desires to contend that the transfers were not made in contemplation of death.

In all cases where a transfer or gift is listed under this schedule, but the value not extended into the second column for inclusion in the gross estate, the executor is required to submit as a part of the return documentary evidence in the form of affidavits fully setting forth all the facts and circumstances indicating the intent of the decedent in making the transfer.

Where the transfer was effected by deed of trust, copy of such instrument should be filed in duplicate.

Make full entry, giving name of transferee, date and form of transfer, description of property, and value at time of death.

For further instruction see Article 22 *et seq.*, Regulations, No. 37, Revised, 1919.

(1) Did the decedent, during the period within two years prior to death, make any transfer of a ma-

terial portion of his estate in the nature of a final disposition or distribution thereof without a fair consideration in money or money's worth? (Answer "Yes" or "No")—no.

(2) Did the decedent, at any time prior to two years before his death, make any transfer or create any trust in contemplation of or intended to take effect at or after death without consideration? (Answer "Yes" or "No.") Yes.—See item one below.

(3) Did decedent, at any time, make a transfer of a material portion of his estate without consideration, but not believed to be in contemplation of death or intended to take effect at or after death? (Answer "Yes" or "No.") No.

(4) What trusts, if any, created by the decedent, were in existence at the time of his death?

Item No.	Details of transfer	Value on day of death	Value to be included in gross estate
1.	130 shares Blaw-Knox Co. preferred par value $100.00, at 160, unlisted (held by Herbert L. May, Trustee)	$20,800.00	20,800.00
	Total		$20,800.00
	Grand Total		$20,800.00

Estate of Pauline May District of 23d, Pennsylvania.

SCHEDULE E

Transfers.

Exhibit No. 1 (Declaration of Trust)

"Pittsburgh, Pa., May 15, 1917.

Whereas Pauline May holds certain property, namely, certain bonds, stocks, notes and moneys, part of which, amounting to a market value of about $150,000. including special bank account, were purchased largely with funds of her husband, Barney May, and she desired to place them in trust as hereinafter mentioned, now, therefore, in consideration of the above and for other good and valuable considerations, it is agreed as follows: Pauline May will sell, assign and transfer said property to B. May, W. A. May, H. L. May, E. C. May and L. J. Affelder as trustees, the said trustees to pay to B. May the net income for life, and after his death to Pauline May for life if she survive him; and after the death of both of them the said property is to be divided equally among her sons and daughter, W. A. May, Estella M. Affelder, H. L. May and E. C. May; all of which will appear in a formal instrument of trust to be drawn up, listing the said property, and to be duly executed by her.

(Signed) PAULINE MAY [SEAL]

Witness:

(Signed) E. H. BEILSTEIN"

"THIS AGREEMENT

Made this first day of October 1917, by and between Pauline May, wife of Barney May, of the City of Pittsburgh, Pa., hereinafter designated the Assignor, and Barney May, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, of the same place, hereinafter designated the Trustees, which agreement may, for convenience, be designated as the 1917 Pauline May Declaration of Trust.

For a good and valuable consideration to the said Assignor specially moving, it is agreed as follows:

First: The said Assignor does hereby transfer, set over and assign, and by these presents has transferred, set over and assigned unto the said trustees, all of the bonds, stocks securities, sums of money, and other property, mentioned in the list or lists attached hereto and signed by the parties hereto, IN TRUST for the uses and purposes herein mentioned, with full power and authority to do and perform all the things, acts and matters as hereinafter set forth as follows, to-wit:

a. To collect the dividends, interest and income thereof, to sell and convey the same or any part thereof if they deem it advisable, for such price or prices, and on such terms and conditions, as they may see fit and proper; to invest and re-invest the proceeds of the said sale or sales in such form or securities or property, real, personal or mixed, as they shall deem proper, whether the same be considered legal investments for trust funds or not, and generally, to exercise, with respect to any and all such bonds, stocks securities, sums of money and other property, all rights, including the right to vote, which are ordi-

narily held by the actual owners thereof, and all persons dealing with the said Trustees concerning the subject or subjects of this trust are hereby relieved from any and all obligation to look to the application of the purchase money.

b. To pay the net dividends, interest and income thereof, after payment of all taxes, costs and expenses incurred by them in their discretion, in the performance of the duties hereunder; to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust, in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among Walter A. May, Herbert L. May, Edwin C. May and Estelle May Affelder, children of the said Pauline May and Barney May, and in case any of such children be deceased, then as such deceased child shall appoint by his or her last will and testament, or by other written instrument, directed to the Trustees, and duly witnessed, and in default of such appointment, to the heirs of such deceased child, *per stirpes.*

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

PAULINE MAY	[SEAL]
BARNEY MAY	[SEAL]
WALTER A. MAY	[SEAL]
HERBERT L. MAY	[SEAL]
EDWIN C. MAY	[SEAL]
LOUIS J. AFFELDER	[SEAL]

Attest:

G. B. RYLAND

LIST ATTACHED TO 1917 PAULINE MAY DECLARATION OF TRUST:

Security	No.	Par Value	Rate	Due	Description
Bonds	3	$1,000	5%	1921	Pbg. Bessemer & Lake Erie Equipment Trust
"	4	1,000	4%	1947	Union Pacific Ry. Co.
"	2	500	4%	1947	Union Pacific Ry. Co.
"	5	1,000	4½%	1963	Chicago Union Station Co.
Gold Notes	5	1,000	5%	1920	Swiss Confederation
Bonds	6	1,000	5%	1949	Philadelphia Company
"	5	1,000	4½%	1965	Pennsylvania R. R. Co.
"	5	1,000	4%	1946	Toronto, Hamilton & Buffalo R. R. Co.
Road Bonds	5	1,000	4%	1926	Allegheny County
Gold Notes	5	1,000	5%	1918	United Kingdom of Great Britain & Ireland
" "	10	1,000	5½%	1919	" " " " "
Bonds	5	1,000	5%	1926	Dominion of Canada
"	5	1,000	4%	1990	W. Va. & Pbg. Ry. Co.
"	10	1,000	5%	1939	Jones & Laughlin Steel Co.
"	5	1,000	6%	1920	Government of Argentine Nation
"	5	1,000	6%	1925	Standard Varnish Works
"	5	1,000	4½%	1964	Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.

Security	No.	Par Value	Rate	Due	Description
"	1	1,000	5%	1919	H. C. Frick Coke Company
"	3	1,000	5%	1920	" " "
"	9	1,000	5%	1921	" " "
"	1	1,000	5%	1949	Monongahela Light & Power Co.
"	10	1,000	3½%	1932 to 1947	U. S. Government Liberty
"	1	500	3½%	"	" " " "
	shares				
stock	50 pfd	100	6%	.....	Harbison-Walker Refractories Co.
"	10	100	....	.....	Real Estate Trust Company
"	54	25	....	.....	Peoples Natural Gas & Piping Co.
"	13	100	....	.....	Union National Bank
"	100	100	....	.....	American Sewer Pipe Co.

Money amounting to $50,000, on deposit with Union Trust Co.

PAULINE MAY [SEAL]
BARNEY MAY [SEAL]
WALTER A. MAY [SEAL]
HERBERT L. MAY [SEAL]
EDWIN C. MAY [SEAL]
LOUIS J. AFFELDER [SEAL]

Attest:
G. B. RYLAND"

EXHIBIT B.

TREASURY DEPARTMENT

Internal Revenue Service
Pittsburgh, Pa.

March 5, 1923.

Estate of PAULINE MAY, deceased.
23rd district of Pennsylvania.
Herbert L. May, Executor,
May Building,
Pittsburgh, Pa.

Enclosed find letter and notice received from the Commissioner of Internal Revenue at Washington, D. C., for transmittal to you, disclosing an additional tax liability of $5557.76 due from this estate.

This amount, $5557.76, should be paid into this office within thirty days after receipt of this letter, as Section 407, Title IV of the Act of February 24, 1919, provides that the excess part of the tax bears interest at the rate of ten per centum per annum from the expiration of thirty days after date of notification until payment is received by the Collector.

Very truly yours,

(signed) D. B. HEINER,
Collector.

GCJ:GP.
enc.

TREASURY DEPARTMENT

Washington

March 2, 1923.

ET—896—AD
District of 23rd Pennsylvania
Estate of Pauline May
Tax Liability $5,557.76.
Barney May, *et al.*, Executors,
Estate of Pauline May,
Care of Collector,
Pittsburgh, Pa.

Sirs:

A review and audit of the return on Form 706 filed for the above named estate in connection with supplemental data obtained upon investigation discloses a total tax liability of $8,026.99.

The return shows a tax liability of $2,469.23, which has been paid. The amount due is $5,557.76 which should be paid to the Collector of Internal Revenue at Pittsburgh, Pennsylvania, within thirty days after receipt of this letter, as Section 407, Title IV of the Act of February 24, 1919, provides that the excess part of the tax bears interest at the rate of ten per centum per annum from the expiration of thirty days after date of notification until payment is received by the Collector.

On the second sheet of this communication is a complete summary of the returned and determined values placed upon the property and also the claimed and allowed deductions. Following the summary is an explanation of the changes made.

Date of death—March 25, 1920.

SUMMARY

GROSS ESTATE:

	Returned (706)	Determined on review
Real estate	$ 14,800.00	$ 16,500.00
Stocks and bonds	93,464.17	93,376.17
Mortgages, notes, cash and insurance	39,814.06	39,814.06
Other miscellaneous property	37,382.64	37,382.64
Transfers	20,800.00	183,889.18
Powers of appointment	.....	.....
Property indentified as taxed within five years	.....	.....
Total gross estate	$206,260.87	$370,962.05

DEDUCTIONS:

Funeral expenses	1,764.00	1,764.00
Administration expenses		
Executor's fee	.....	.....
Attorney's fee	750.00	750.00
Miscellaneous	95.02	83.02
Debts of decedent	5,190.32	5,190.32
Unpaid mortgages	.....	.....
Net losses during settlement	.....	.....
Support of dependents	.....	.....
Property identifies as taxed within five years	.....	.....
Charitable, public, and similar bequests	.....	.....

	Returned (706)	Determined on review
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total	$ 57,799.34	$ 57,787.34
Net estate for tax	$148,461.53	$313,174.69
Total tax	2,469.23	8,026.99
Additional tax due		5,557.76

The changes as indicated below show the specific adjustments, as determined by this Bureau, in accordance with the Estate Tax Law.

GROSS ESTATE:

	Returned	Determined
Real Estate		
Item 1,	$ 14,800.00	$ 16,500.00
Stocks and Bonds		
Item 2,	8,976.00	8,971.00
Item 4,	22,430.00	22,440.00
Item 7,	4,630.50	4,537.50

Transfers

The value of the following described property transferred by decedent in her lifetime is included in her gross estate, it having been determined after careful consideration of all the facts that such transfers are taxable

	Returned	Determined
under the Federal Estate Tax Law.		
Transfer by decedent by trust created October 1, 1917	.....	0,000.00
Pittsburgh, Bessemer & Lake Erie Railroad Company, 5's	.....	3,000.00
$4,000 Union Pacific Railway Company 4's	.....	3,280.00
$1,000 Union Pacific Railway Company 4's	.....	820.00
$5,000 Chicago Union Station 4½'s	.....	4,000.00
$5,000 Swiss Conferation, 5's	.....	5,000.00
$6,000 Philadelphia Company, 5's	.....	5,400.00
$5,000 Pennsylvania Railroad Company, 4½'s	.....	4,006.25
$5,000 Toronto, Hamilton and Buffalo Railroad Company, 4's	.....	3,450.00
$5,000 Allegheny County 4's	.....	4,800.00
$5,000 United Kingdom of Great Britain and Ireland 5's	.....	4,750.00
$10,000 United Kingdom of Great Britain and Ireland 5½'s,	.....	9,500.00
$5,000 Dominion of Canada 5's	.....	4,550.00
$5,000 West Virginia and Pittsburgh Railway Company 4's	.....	3,000.00

	Returned	Determined
$10,000 Jones and Laughlin Steel Company, 5's	.....	9,300.00
$5,000 Government of Argentina, 6's	.....	3,700.00
$5,000 Standard Varnish Works, 6's	.....	5,000.00
$5,000 P. C. C. & St. Louis Railroad, 4½'s	.....	4,250.00
$13,500 H. C. Frick Coke Company, 5's	.....	12,350.00
$1,000 Monongahela Light and Power Company, 5's	.....	820.00
$10,500 United States First Liberty Loan	.....	10,237.50
50 Shares Harbison Walker Refactories Company	.....	5,000.00
10 shares Real Estate Trust Company	.....	1,200.00
50 shares Peoples Natural Gas and Piping Company,	.....	2,025.00
13 shares Union National Bank	.....	3,315.00
100 shares American Sewer Pipe Company,	.....	9,300.00
Accrued income on above,	.....	1,813.64
Cash advanced by agreement March 22, 1920, for purchase of property on Penn Avenue, E. E., Pittsburgh,	.....	33,000.00
Accrued interest thereon,	.....	13.75

DEDUCTIONS:

	Determined	Returned
Miscellaneous administration expenses,	83.02	95.02
Difference between net estate returned and determined to balance	164,713.18	.....

Miscellaneous administration expenses are deducted in the amount found upon investigation to be correct.

This letter represents the final audit of the Bureau. All questions relating to the payment of this tax should be taken up direct with the collector and not with this office.

Respectfully,

(Signed) MCKENZIE MOSS,
Deputy Commissioner.

AMB.

EXHIBIT "C."

CLAIM FOR
ABATEMENT OF TAX ASSESSED

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Pennsylvania,
County of Allegheny. } *ss:*

ESTATE OF PAULINE MAY, DECEASED

c/o Herbert L. May, et al., Executors,

May Building, Pittsburgh, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.
2. Character of assessment or tax. Additional Estate Tax.
3. Amount of assessment or stamps purchased $5,557.76
4. Reduction of Tax Liability requested (Income and Profits Tax) .....
5. Amount to be abated 5,524.42

6. Amount to be refunded (or such greater amount as is legally refundable) .....
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed. 23rd District of Pennsylvania.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit .....
11. Unpaid assessment against which credit is asked; period from to .....

Deponent verily believes that this application should be allowed for the following reasons:

The additional assessment, to the extent of the above mentioned sum of $5524.42, is based upon the following: The executors, in their return, (Form 706) reported on Schedule E "Transfers" property to the extent of $20,800, and attached thereto as Exhibit No. 1, copies of a trust created by decedent by two instruments, said instruments being dated, respectively, May 15, 1917 and October 1st, 1917. The Commissioner of Internal Revenue, upon a review and audit of the return, included in the property to be returned under Schedule E, property subject to said trust, amounting to $163,089.18, and determined the total of Schedule E to be $183,889.18. There were some other minor changes made, against which the taxpayers are making no formal complaint, although they believe them to be erroneous, for the reason that they do not justify a controversy.

Deponent avers that the amount returned on Schedule E in said return, is correct, and that the amount

as determined by the Commissioner is incorrect, for the reason that the said trust was not in contemplation of or intended to take effect in possession or enjoyment, at or after the decedent's death, and, in support thereof, the taxpayers file herewith and make part hereof, the brief of Sachs & Caplan, Attorneys for the estate. Power of Attorney is filed herewith.

(Signed) EDWIN C. MAY.

Sworn to and subscribed before me this 29th day of March, 1923.

(Signed) DOROTHY C. PAULIN,
N. P.

EXHIBIT "D."

TREASURY DEPARTMENT

Internal Revenue Service
Pittsburgh, Pa.

May 3, 1923.

Estate of PAULINE MAY,
23rd district of Pennsylvania.
Edwin C. May, Executor,
May Building,
Pittsburgh, Pa.

Sirs:

Enclosed find letter from the Commissioner of Internal Revenue at Washington, for transmittal to you, relative to your claim for the abatement of $5524.42 of the additional estate tax disclosed by Bureau letter of March 2, 1923. You will note the action taken by the Commissioner relative to your claim, and that same has been rejected in full.

The amount of the claim rejected, $5524.42 should be paid into this office without further delay, together with interest at the rate of 10% per annum from April 5, 1923, until paid.

Very truly yours,

D. B. HEINER,
Collector.
(G. C. H.)

GCJ* :GP.
enc.—

EXHIBIT "E."

CLAIM FOR
REFUND OF TAXES ILLEGALLY COLLECTED

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Pennsylvania,
County of Allegheny. } *ss:*

ESTATE OF PAULINE MAY, DECEASED

c/o Herbert L. May, et al., Executors,
May Building, Pittsburgh, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.
2. Character of assessment or tax.
3. Amount of assessment or stamps purchased $5,763.82
4. Reduction of Tax Liability requested (Income and Profits Tax).
5. Amount to be abated.
6. Amount to be refunded (or such greater amount as is legally refundable) 5,763.82
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) September 11th, 1923.

(If statement covers income tax liability, items 8-11, inclusive, must be answered).

8. District in which return (if any) was filed.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit.
11. Unpaid assessment against which credit is asked; period from to .....

Deponent verily believes that this application should be allowed for the following reasons:

The additional assessment, to the extent of $5,524.42, with interest, making a total of $5,763.82, is based upon the following: The executors, in their return (Form 706) reported on Schedule E "Transfers" property to the extent of $20,800, and attached thereto as Exhibit No. 1, copies of a trust created by decedent by two instruments, said instruments being dated, respectively, May 15, 1917 and October 1st, 1917.

The Commissioner of Internal Revenue, upon a review and audit of the return, included in the property to be returned under Schedule E, property subject to said trust, amounting to $163,089.18, and determined the total of Schedule E to be $183,889.18. Deponent avers that the amount returned on Schedule E in said return is correct, and that the amount as determined by the Commissioner is incorrect for the reason that the said trust was not in contemplation of or intended to take effect in possession or enjoyment, at or after the decedent's death.

(Signed) EDWIN C. MAY,
One of the Executors.

Sworn to and subscribed before me this 5th day of November, 1923.

(Signed) DOROTHY C. PAULIN,
Notary Public.

EXHIBIT "F."

WASHINGTON

February 20, 1924.

ET—896—61.R—PEM
District of 23rd Pennsylvania,
Estate of Pauline May,
Date of Death—March 25, 1920.
Herbert L. May, et al., Executors,
Estate of Pauline May
May Building,
Pittsburgh, Pa.

Sirs:

The Bureau has examined the claim filed by you on behalf of the above named estate for refund of

$5,763.82 of the Federal estate tax paid under the Revenue Act of 1918.

Your protest is directed against the inclusion in the decedent's gross estate of certain property which was the subject of a trust fund established by the decedent. The facts relative to this matter are as follows:

The trust was created by written instruments executed by decedent May 15, 1917, and October 1, 1917. The decedent died March 25, 1920. These trust instruments provided that the trustees pay to Barney May, who was the husband of the decedent, the net income for life, and after his death, to Pauline May for life, if she survive him, and after the death of both, the said trust fund was to be divided equally between the sons and daughters of the decedent.

It is contended by the executors that this trust was not created by the decedent in contemplation of, or intended to take effect in possession or enjoyment at or after death.

This trust was included in decedent's gross estate on final audit and review on the ground that it was intended to take effect in possession or enjoyment at or after death. In this case the principal of the trust fund could not take effect in possession until the death of the decedent. According to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death. The gift of the principal, therefore, could not take effect during the decedent's lifetime. This case comes literally within the terms of the statute, and it has been held by a number of courts in different States that such a transfer as this is taxable, these cases being

decided under statutes using the same language as is contained in the Federal Estate Tax Law.

It is therefore the opinion of the Bureau that the transfers involved were properly included in the decedent's gross estate.

In view of the foregoing, your claim for refund of $5,763.83 is rejected in full.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

NDL

Motion to Strike.

Filed August 3, 1925.

And now, August 3, 1925, comes the defendant in the above case and excepts to the plaintiff's statement filed herein and moves the Court to strike the same from the record for the following reasons:

1. That the trust created by the decedent in her life time as set forth is properly included in the decedent's gross estate under the provisions of Section 402 (c) of the Revenue Act of 1918.

2. And for other good and sufficient reasons to be set forth at the hearing of this motion.

JOHN D. MEYER.

Opinion.

Filed January 12, 1928.

THOMSON, J.:

This is an action brought to recover an additional Federal Estate Tax, on the ground of its illegal assessment and collection under the provisions of the Revenue Act of 1918.

The plaintiffs having filed their statement and amended statement of claim, an affidavit of defense was filed raising questions of law, which are before the Court for determination. The decision of this case has been greatly delayed due to a combination of causes not essential to state.

Pauline May died on March 25, 1920. Having executed a paper declaring her intention to create a trust, under a formal instrument to be drawn for that purpose, she did, on October 1, 1917, execute such instrument. The question, therefore, arises, whether such trust, created by the decedent more than two years prior to her death, was created in contemplation of, or intended to take effect in possession or enjoyment, at or after her death. After assigning certain property to the trustees, and giving them full power and authority to deal with the same, she directed the trustees as follows:

> "To pay the net dividends, interest and income thereof, after payment of all taxes, costs and expenses incurred by them in their discretion, in the performance of the duties hereunder; to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust,

in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among Walter A. May, Herbert L. May, Edwin C. May and Estelle May Affelder, children of the said Pauline May and Barney May, and in case any of such children be deceased, then as such deceased child shall appoint by his or her last will and testament, or by other written instrument, directed to the trustees, and duly witnessed, and in default of such appointment, to the heirs of such deceased child, per stirpes."

The material part of the Revenue Act of 1918, is as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be

deemed to have been made in contemplation of death within the meaning of this title * * *"

From the plain language of the trust, the donor gave the income of the fund to her husband for life, and the corpus of the fund to her children; but the gift of the corpus is effective only after the death of Mrs. May, the donor. In this case, it was the gift of the corpus of the fund which was included in valuing the gross estate. The gift becomes the legal, as distinguished from the equitable, property of the children only after the death of the donor of the trust.

It is certainly true, that the property covered by the gift included in the gross estate, came into the possession or enjoyment of the donees only after the death of the donor. It seems to be settled by the authorities that the phrase "to take effect in possession or enjoyment at, or after death", is used to designate a situation in which the donee's rights with respect to the property (as distinguished from an estate or interest in the property) changed at, or after, and because of, the donee's death. It is perfectly clear that the donor, by adopting a trust form of conveyance, manifested her intention that the property should not come into the present possession of the beneficiaries. By providing in effect, for the termination of the trust after death, the possession is made to take effect at that time. While it is true that the trust may be said to take effect in enjoyment at once, the settler, by imposing the trust, has made a transfer of the corpus which not only was intended to, but actually does, take effect in possession after death. From its very nature, a trust deprives the beneficiaries

of possession as long as the trust continues. The mere receipt of income does not constitute possession, or enjoyment, within the meaning of the statute. In order to escape the statute, the donee must be in actual possession and enjoyment of the property before death. It has been so held, in the case of *Vanderbilt v. Eidman,* 196 U. S. 480; in dealing with the inheritance tax imposed by the Act of 1898, the Supreme Court, at page 491, said:

> "It will be observed that the duties imposed in Section 29 have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the Statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. * * *"

The possession of property means that,

> "* * * The property, together with all the attributes of ownership, must pass from the donor, to take effect independently of his death."

Re—*Fulham's Estate,* 96 Vt. 308.

One of the attributes of ownership is the right to dispose not only of the income, but the corpus of the property. Another attribute, is the right to use the property. Neither of these attributes are present

here. The donees could not use the property until the founder of the trust died. It seems manifest in this case, that the founder intended that the possession and enjoyment of the corpus of the trust fund should be postponed until after her death. To prevent the beneficiaries from having control of the corpus until that time, was the very purpose for which the trust was created. The authorities seem to establish, that it is only when the beneficiaries have the use and disposal of the property, independently of, and without reference to, the donor's death, that the gift escapes the taxation imposed by the statute.

In re—Waugh, 78 Pa., 436;
State Street Trust Co. v. Stevens, 209 Mass. 373;
In re—Bottomley's Estate, 92 N. J. Eq., 202;
In re—Egerton's Estate, 170 N. Y. S., 223.

It appears wholly immaterial that the donor may retain no interest whatever in the fund. Almost conclusive evidence of this position, is the fact that Congress included in the same section, gifts made in contemplation of death. These necessarily vested title and exclusive enjoyment in the donee prior to death. Both before and after the passage of the Federal Act, the Courts held that the reservation of income was not important. In the case of *Shukert v. Allen,* 6 Fed 2nd, 551, Shukert retained no interest whatever in either the income, or the corpus of the property. He had created, during his life, a trust which provided that the income should be accumulated, and the fund with the accumulations, should be distributed amongst his children, or the survivors after

his death. The Circuit Court of Appeals of the Eighth Circuit, held that the trust was not intended to take effect in possession or enjoyment at, or after the death, within the meaning of the statute.

To the same effect is *Coolidge v. Nicholas,* 4 Fed. 2nd, 112. Many State cases are to the same effect. In the case of *Re Edwards,* 32 N. Y. S., 901, there was a gift *causamortis,* of several savings bank books and the deposits which they represented. The Court held the gift taxable, not because of any interest retained by the donor, but because full enjoyment did not vest in the donee. The Court said:

> "Mrs. Abbott, the donee, could have no possession or enjoyment of the principal until after his death. The fact that she had the possession and enjoyment of the income in his life time, makes no difference."

The persons who were to take the corpus could not be determined until after the founder's death. How could it be said, therefore, that either the property or an estate therein, is in possession or enjoyment at a time when the person who is to own the property, is not ascertained.

In conclusion, both from the wording of the statute itself and from the authorities, both Federal and State, it seems clear that the value of the corpus of the trust funds was properly included in the gross estate of the decedent, because they constituted property with respect to which the decedent made transfers, intended to take effect in possession or enjoyment at or after her death.

It follows, therefore, that the questions of law

raised by the affidavit of defense must be found in favor of the defendant.

ORDER.

And now, to wit, January 12th, 1928, for the reasons set forth in the foregoing opinion, judgment is directed to be entered in favor of the defendant on the questions of law raised by the affidavit of defense.

W. H. S. THOMSON.

Assignment of Error.

Filed February 25, 1928.

The Court erred in entering the following judgment and order on the affidavit of defense filed by defendant, raising questions of law, said order being as follows:

ORDER.

"And now, to wit, January 12th, 1928, for the reasons set forth in the foregoing opinion, judgment is directed to be entered in favor of the defendant on the questions of law raised by the affidavit of defense.

BY THE COURT."

Stipulation for Printing Record.

Filed February 25, 1928.

And now, to-wit, February 25th, 1928, it is hereby stipulated and agreed between counsel for plaintiff and counsel for defendant that the following be printed as and constitute the record on writ of error in the above case before the United States Circuit Court of Appeals for the Third Circuit, viz:

1. Docket entries;
2. Statement of Claim;
3. Affidavit of Defense;
4. Opinion of court filed January 12th, 1928;
5. Assignment of errors;
6. This stipulation.

SACHS & CAPLAN,
Attorneys for Plaintiffs.
W. J. AIKEN,
Asst. U. S. Attorney,
Attorney for Defendant.

Certificate of Probable Cause.

Filed May 3, 1928.

And now, on this 3rd day of May, 1928, the Court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the Collector of Internal Revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

R. M. GIBSON,
United States District Judge.

Certificate.

Western District of Pennsylvania, ss:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record in Error in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this ..... day of ....., A. D. 1928.

J. WOOD CLARK,
Clerk.

Minute entry of argument and submission November 8, 1928, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3811

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, Deceased, Plaintiffs-Appellants,

vs.

D. B. HEINER, Collector of Internal Revenue, Defendant-Appellee

On Appeal from the District Court of the United States for the Western District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

OPINION—Filed Jan. 9, 1929

Per CURIAM:

Affirmed on the opinion of the court below with the observation that this case is distinguished from Nichols vs. Coolidge, 274 U. S. 531, on the facts.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3811 (List No. 44)

W. A. MAY et al., Executors Pauline May, Dec'd, Appellants,

vs.

D. B. HEINER, Collector, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed Jan. 9, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 9, 1929.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

Petition for rehearing, covering 11 pages, filed January 18, 1929, omitted from this print. It was denied and nothing more by order June 24, 1929.

In United States Circuit Court of Appeals for the Third Circuit, October Term, 1928

No. 3811 (List No. 44)

W. A. May et al., Exrs. Pauline May, Dec'd, Appellants,

vs.

D. B. Heiner, Collector, Appellee

Order Denying Rehearing—Filed June 24, 1929

And now, to wit, June 24, 1929, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, June 24, 1929.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,442. U. S. Circuit Court of Appeals, Third Circuit. Term No. 311. Walter A. May, Herbert L. May, Edwin C. May, et al., executors of the last will and testament of Pauline May, deceased, petitioners, vs. D. B. Heiner, Collector of Internal Revenue for 23rd District of Pennsylvania. Petition for writ of certiorari and exhibit thereto. Filed August 8, 1929. File No. 34,442.